Supreme Court, U.S.
FILED
AUG 27 2003
OFFICE OF THE CLERK

No. 02-1720

IN THE

Supreme Court of the United States

AUTO STIEGLER, INC.,

Petitioner,

v.

ALEXANDER M. LITTLE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE PETITION

This case does not present the Court with the opportunity properly to address the issue Petitioner Auto Stiegler, Inc. ("Auto Stiegler") frames. Auto Stiegler posits the issue as whether the Federal Arbitration Act [1] ("FAA") preempts the California Supreme Court's "blanket" rule that all employers must always pay all arbitration forum costs in matters involving state law claims of wrongful termination in violation of public policy. The issue thus framed is not consonant with the facts or the law applicable to (or announced by) the California Supreme Court's decision in *Little v. Auto Stiegler, Inc.* ("*Little*").[2]

The first problem with Auto Stiegler's formulation is that the FAA does not provide for any particular allocation of the costs unique to arbitration; and, the parties' arbitration agreement here was silent as to the allocation of such costs to arbitrate Respondent Alexander M. Little's ("Little") state law claims. As a result, the parties and California's courts properly applied state law to determine how such costs were to be allocated. The California Supreme Court then applied state law, applicable to all contracts, and held that imposing the costs unique to arbitration upon an employee litigating claims "unwaivable" under state law—pursuant to an adhesive contract—would be unconscionable. *Little* does not represent a refusal to enforce the parties' arbitration agreement, as written, nor an impediment to its enforcement; hence, it does not contradict (nor is preempted by) any provision of the FAA.

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1. 9 U.S.C. §§ 1 through 16.

2. 29 Cal.4th 1064, 63 P.3d 979, 130 Cal.Rptr.2d 892 (2003).

Second, the California Supreme Court's decision in *Little* is not inconsistent with this Court's decision in *Green Tree Financial Corp. v. Randolph*.[3] In *Green Tree*, this Court held that silence in an arbitration agreement as to how costs would be allocated for the arbitration of federal statutory claims "does not render the agreement unenforceable."[4] Before such an arbitration agreement can be invalidated *in toto* over the allocation of costs, the Court required a case-by-case fact specific analysis.

In *Little*, California agreed with *Green Tree* that silence on the allocation of fees does not render an arbitration agreement unenforceable. The court in *Little enforced* the parties' agreement, ordering them to arbitrate their dispute, by interpreting the agreement under state law so as not to include an unconscionable clause. In that context, *Green Tree's* case-by-case formulation is not required; it simply does not apply.

This Court should deny the Petition because the question of who should pay for the arbitration of state law claims involving "unwaivable rights" under state law is properly a question of state law. The California Supreme Court *enforced* the arbitration agreement here, to the extent of the parties' actual agreement, and applied the same state law to the agreement as applies to any contract in California.[5]

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3. 531 U.S. 79 (2000).

4. *Green Tree*, 531 U.S. at 82.

5. Contrary to the argument of *Amicus curiae* Employers Group in support of Auto Stiegler's Petition, as to the issues actually decided in *Little*, there is no split to resolve among the California and federal courts as to the enforcement of contractual clauses that are unconscionable under applicable state law.

I.

THE CALIFORNIA SUPREME COURT'S DECISION IN *LITTLE* IS NEITHER PREEMPTED BY THE FAA NOR INTERFERES WITH THE ENFORCEMENT OF ARBITRATION AGREEMENTS SUBJECT TO IT

The interpretation of private contracts that provide for arbitration is generally a question of state law. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 474 (1989); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). As a consequence, the question of who should pay the costs unique to arbitration of "unwaivable" state law claims, particularly when the parties' agreement is *silent* on the issue, is a matter of state law.[6] *Volt*, 489 U.S. at 476 ("There is no federal policy favoring arbitration under a certain set of procedural rules[.]") Review of the California Supreme Court's decision in *Little* is unwarranted because its holding is neither preempted by the FAA nor interferes with the enforcement of arbitration agreements subject to the FAA.

A. The FAA Does Not Preempt Application Of State Laws—Applicable To All Contracts—To Arbitration Agreements.

The FAA "contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt*, 489 U.S. at 477. Instead, the FAA provides that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or

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6. Of course, a state may not apply rules that hinder arbitration that would not be applied to private contracts in general. Such is not the case here.

in equity for the revocation of any contract." 9 U.S.C. § 2. "Thus, generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening [9 U.S.C.] § 2." *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

In applying the FAA to the arbitration of federal statutory claims, this Court has been careful to note that, "'by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20, 26 (1991), *quoting from Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). "'So long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.'" *Gilmer*, 500 U.S. at 28, *quoting from Mitsubishi Motors*, 473 U.S. at 637.

Little is consistent with these principles.

B. *Little* Properly Applied California Law—Applicable To All Contracts—To Determine Who Should Pay The Costs Unique To Arbitration Of "Unwaivable Claims" Under An Adhesive Contract

The court in *Little* did not invalidate the parties' arbitration agreement, as written; the court enforced it without inferring a procedural structure that would have been unconscionable under state law generally applied to all contracts. "One such long-standing ground for refusing to enforce a contractual term is that it would force a party to

forgo unwaivable public rights[.]" *Little*, 29 Cal.4th at 1079. California's protection of unwaivable rights is applied to contracts beyond those compelling arbitration. *Baker Pacific Corporation v. Suttles*, 220 Cal.App.3d 1148, 269 Cal.Rptr. 709 (1990) (mandatory employee waiver of all employer liability for asbestos exposure void as against public policy); *Neubauer v. Goldfarb*, 108 Cal.App.4th 47, 133 Cal.Rptr.2d 218 (2003) (waiver of corporate directors' and majority shareholders' fiduciary duties to minority shareholders in close corporation void as against pubic policy); *Akin v. Business Title Corporation*, 264 Cal.App.2d 153, 70 Cal.Rptr. 287 (1968) (exculpatory clause which relieved escrow company of liability for its own ordinary negligence void against public policy).

In *Little*, the court applied the principles announced in *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal.4th 83, 6 P.3d 669 (2000) ("*Armendariz*") which involved arbitration of state statutory claims of discrimination under California's Fair Employment and Housing Act ("FEHA").[7]

> In Armendariz, we held that arbitration of claims under the FEHA is subject to certain minimal requirements: (1) the arbitration agreement may not limit damages normally available under the statute [citation omitted]; (2) there must be discovery sufficient to adequately arbitrate their statutory claim [citation omitted]; (3) there must be a written arbitration decision and judicial review sufficient to ensure the arbitrators comply

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7. Cal. *Government Code Anno.* §§ 12490, *et seq.* (Thomson-West 2003).

> with the requirements of the statute [citation omitted]; and (4) the employer must pay all types of costs that are unique to arbitration [citation omitted].
>
> These requirements were founded on the premise that certain statutory rights are unwaivable. This unwaivability derives from two statutes that are themselves derived from public policy. First, *Civil Code section* 1668 states: "All contracts which have as their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." "Agreements whose object, directly or indirectly, is to exempt [their] parties from violation of the law are against public policy and may not be enforced." [Citation.] Second, *Civil Code section* 3513 states, "Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." [Citations.]
>
> . . . .

Little, 29 Cal.4th at 1076-1077 (internal quotation marks denoting quotation from *Armendariz* omitted.)

In applying these principles to claims of wrongful termination in violation of public policy (labeled after *Tameny v. Atlantic Richfield Co.*, 27 Cal.3d 167, 610 P.2d 1330 (1980)), the court in *Little* explained:

> A Tameny claim is almost by definition unwaivable. [The] public policy exception to the at-will employment rule must be based on policies

> carefully tethered to fundamental policies that are delineated in constitutional or statutory provisions. . . . Thus, a legitimate Tameny claim is designed to protect a public interest and therefore cannot be contravened by private agreement. . . . Accordingly, because an employer cannot ask the employee to waive Tameny claims, it also cannot impose on the arbitration of these claims such burdens or procedural shortcomings as to preclude their vindication.

Little, 29 Cal.4th at 1077.

The decision in *Little* is consonant with California's principles of contract interpretation applied to all contracts in the state. As such, no provision of the FAA is contravened and no contracts subject to its proscriptions are improperly impaired.[8]

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8. Contrary to Auto Stiegler's argument (Petition at 20), *Little* does not present the specter of opening Pandora's Box to apply to "virtually any employment claim." The California Supreme Court has been scrupulous in limiting the scope of causes of action for wrongful termination in violation of public policy to such policies "tethered to fundamental policies that are delineated in constitutional or statutory provisions[.]" *Little*, 29 Cal.4th at 1077. *Green v. Ralee Engineering Co.*, 19 Cal.4th 66, 960 P.2d 1046 (1998) (administrative regulations implementing airline safety through the Federal Aviation Act of 1958 could be a source of fundamental public policy); *Turner v. Anheuser-Busch, Inc.*, 7 Cal.4th 1238, 876 P.2d 1022 (1994) (alleged whistleblowing as to violations of the company's internal operating practices did **not** violate fundamental public policy); *Jennings v. Marralle*, 8 Cal.4th 121, 876 P.2d 1074 (1994) (alleged age discrimination by company with fewer than five employees (therefore not covered by the FEHA) did **not** violate fundamental public policy).

II.

THE CALIFORNIA SUPREME COURT'S DECISION IN *LITTLE* DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *GREEN TREE*

In *Green Tree*, this Court was faced with making the determination of whether the imposition of the costs of arbitrating federal statutory claims could render an entire agreement unconscionable (a principle accepted by implication). The Court held that the party resisting arbitration bore the burden of proving that such fees would be an unacceptable impediment to the adjudication of statutory rights. *Green Tree*, 531 U.S. at 92. Finding an insufficient factual showing there, the Court reversed the court of appeals, holding that silence alone "does not render the agreement unenforceable." *Id.*, at 82. Nothing in *Little* conflicts with *Green Tree*.

First, the California Supreme Court enforced the arbitration agreement between Auto Stiegler and Little, just as the Court in *Green Tree* enforced the arbitration agreement at issue there. The *Little* court's bright line rule as to the allocation of costs unique to arbitration when state-protected "unwaivable rights" are involved expressly provides that such arbitration agreements are enforceable. As with any contract in California, arbitration agreements simply cannot be interpreted under state law to impair the right of an employee to vindicate "unwaivable rights" in an arbitral, instead of a judicial, forum.

> Armendariz and Green Tree agree on two fundamental tenets. First, silence about costs in an arbitration agreement is not grounds for

> denying a motion to compel arbitration. Second, arbitration costs can present significant barriers to the vindication of statutory rights.

Little, 29 Cal.4th at 1084.

Second, Auto Stiegler's argument (Petition at 15)—that *Little's* allocation of fees in adhesive predispute arbitration agreements violates the FAA because it burdens only employment arbitration contracts—focuses the lens backwards. California's protection of an employee's right to adjudicate "unwaivable claims" arises from California's general protection of unwaivable rights possessed by all California citizens when impacted by any private adhesive contract. *Baker Pacific Corporation*, 220 Cal.App.3d at 1157; *Neubauer*, 108 Cal.App.4th at 57; *Little*, 29 Cal.4th at 1084 ("[The cost-shifting analysis in *Armendariz*] is derived from state contract law principles regarding the unwaivability of certain public rights in the context of a contract of adhesion.").

> "[A] contract entered into between two parties of unequal bargaining strength, expressed in the language of a standardized contract, written by the more powerful bargainer to meet its own needs, and offered to the weaker party on a 'take it or leave it' basis carries some consequences that extend beyond the orthodox implications." (*Gray v. Zurich Ins. Co.* (1966) 65 Cal.2d 263, 269 [54 Cal.Rptr. 105, 419 P.2d 168].) Where the public interest is affected the exculpatory clause will be held invalid. (See *Tunkl v. Regents of the*

> *University of California, supra* (1963) 60 Cal.2d 92.) We hold that the exculpatory clause before us cannot relieve the escrow company from liability.

Akin, 264 Cal.App.2d at 159.

The only reason the court in *Armendariz* focused on "mandatory predispute employment arbitration agreements" is that only the *clause* that sought to impose the costs of arbitration of "unwaivable claims" on the weaker party (the employee) in an adhesive contract would be unconscionable. *Little*, 29 Cal.4th at 1080 ("[I]t is not the arbitration agreement itself but the imposition of arbitration forum costs that under certain circumstances violate state law.") Therefore, only those *clauses* in adhesive contracts entered into *before* the dispute arises (not employer/employee arbitration agreements as a whole) would be unenforceable under state law. *Little* does not impose a unique burden on employer/employee arbitration agreements.

III.

REVIEW OF *LITTLE* TO RESOLVE DIFFERENCES AMONG THE CIRCUITS IS UNNECESSARY BECAUSE THERE IS NO CONFLICT AS TO THE ENFORCEMENT OF ARBITRATION AGREEMENTS WITHOUT PROVISIONS FOUND UNCONSCIONABLE UNDER STATE LAWS APPLICABLE TO ALL CONTRACTS

Amicus curiae Employers Group proffers a false dichotomy among the federal circuit courts of appeals and California to contend that review of *Little* is appropriate to resolve a split among the courts. The dichotomy is illusory.

In every case cited by *Amicus* as following *Green Tree's* case-by-case approach, the issue to be decided was whether to invalidate the *entire* arbitration agreement, and refuse to compel arbitration, based upon the issue of the allocation of costs. Neither *Little*, nor those cases in which the arbitration agreements at issue were held to be unenforceable, is to the contrary. In those cases in which arbitration was not compelled, the agreements suffered from multiple infirmities that rendered them completely unconscionable, or a specific showing of financial hardship infringing on the ability of the specific party involved to arbitrate was shown. In short, there is no conflict over the essential holding in *Little*.

Amicus cites decisions from the Third and Fourth Circuits, and from district courts in the Second and Fifth Circuits as following *Green Tree*. *Blair v. Scott Specialty Gases*, 283 F.3d 595 (3d Cir. 2002); *Bradford v. Rockwell Semiconductor Systems, Inc.*, 238 F.3d 549 (4th Cir. 2001); *Mildworm v. Ashcroft*, 200 F. Supp.2d 171 (E.D.N.Y. 2002); *Boyd v. Town of Hayneville*, 144 F. Supp.2d 1272 (M.D.Ala. 2001). There are, of course, others as well. *Musnick v. King Motor Company of Fort Lauderdale*, 325 F.3d 1255 (11th Cir. 2003); *Thompson v. Irwin Home Equity Corp.*, 300 F.3d 88 (1st Cir. 2002); *Primerica Life Insurance Co. v. Brown*, 304 F.3d 469 (5th Cir. 2002); *Burden v. Check Cash of Kentucky, LLC*, 267 F.3d 483 (6th Cir. 2001).

In each case cited above, however, the issue was the enforceability of the entire arbitration agreement, and the courts declined to invalidate the entire agreement absent a showing from the party resisting arbitration of the specific financial burdens that would have been imposed. All well and good.

In *Little*, the court also enforced the parties' arbitration agreement (silent as to the allocation of fees), and acted to safeguard the "unwaivable rights" of the weaker party by ensuring that an unconscionable provision for the allocation of fees did not interfere with the adjudication of those rights. Such an approach—excising an unconscionable contractual provision and enforcing the rest of the agreement—is consistent with the approach accepted by federal courts as well, and is not inconsistent with *Green Tree*. *Spinetti v. Service Corp. International and Service Corp. of Pennsylvania*, 324 F.3d 212 (3d Cir. 2003) (provision that each party pay its own attorneys' fees and split the costs of arbitration, regardless of the outcome, held unconscionable but severable, arbitration compelled under *Green Tree*); *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677 (8th Cir. 2001) (clause forbidding the award of punitive damages severed, arbitration compelled).[9]

On the other hand, *Amicus'* citation to *Circuit City v. Adams*, 279 F.3d 889 (9th Cir. 2002), *cert den.*, 535 U.S. 1112 (2002), and *Ingle v. Circuit City*, 328 F.3d 1165 (9th Cir. 2003)

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9. *Amicus'* citation to *Brown v. Wheat First Securities, Inc.*, 257 F.3d 821 (D.C.Cir. 2001) does not compel a different conclusion. True, as observed in *Little*, *Brown* and *Little* disagree on the extent to which state law can apply to arbitration agreements subject to the FAA. *Little*, 29 Cal.4th at 1078. However, the difference may be explained in the difference between the more amorphous "public policy" claims in the District of Columbia—which *Brown* could not easily define—with the concept of "unwaivable rights" arising from state law in California, and carefully circumscribed by California's highest court. *Green*, 19 Cal.4th at 79. Attempts to infringe upon those rights by contract are proscribed by California's statutes and unconscionable. At all events, any differences in the approaches of *Little* and *Brown*, based upon different statutory schemes, hardly require resolution by this Court.

does not establish a split among the courts. In both cases, the Ninth Circuit found far more pervasively unconscionable aspects to the Circuit City agreements than the cost sharing provisions. *Circuit City*, 279 F.3d at 896 ("[T]he objectionable provisions pervade the entire contract. In addition to the damages limitation and the fee-sharing scheme, the unilateral aspect of the DRA runs throughout the agreement and defines the scope of the matters that are covered."); *Ingle*, 328 F.3d at 1180 (same).

Finally, Amicus' reliance on *Ball v. SFX Broadcasting, Inc.*, 165 F. Supp.2d 230 (N.D.N.Y. 2001) and *Cooper v. MRM Investment Co.*, 199 F. Supp.2d (M.D. Tenn. 2002) to establish a split is also misplaced. In both, the parties resisting arbitration made sufficient factual showings under *Green Tree*. *Ball*, 165 F. Supp.2d at 240 ("[R]egardless of whether or not a per se rule is adopted in this case, Christopher has made a showing that she cannot afford to pay the fees imposed under the arbitration agreement."); *Cooper*, 199 F.Supp.2d at 781 ("In this case. Plaintiff's affidavit convinces the Court that she will be unable to pay the high costs of arbitration.")

CONCLUSION

There is no "deep and mature"[10] conflict as to the basic holding of *Little*. *Little's* bright line rule neither violates the FAA, nor the fundamental holding in *Green Tree*. For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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10. Brief of Employers Group at 5.